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In the Supreme Court of the United States

OCTOBER TERM, 1946

No. 1260

VICA COMPANY, A CORPORATION, PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the Tax Court of the United States (R. 110–124) is reported in 5 T. C. 535. The opinion of the Circuit Court of Appeals (R. 224–235) is reported in 159 F. 2d 148.

JURISDICTION

The judgment of the Circuit Court of Appeals, affirming that of the Tax Court, was entered on January 20, 1947 (R. 235). The petition for a writ of certiorari was filed on April 18, 1947. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

1. Whether the Tax Court properly granted a motion to dismiss a proceeding for refund of processing taxes on the ground that the claimant would be limited at trial to proof of the facts stated in the claim for refund, and those facts, if proved, would not show that claimant bore any of the burden of the processing taxes paid and was thus entitled to a refund.

2. Whether the Courts below properly ruled that the Commissioner did not waive the defects of the claim for refund.

STATUTE AND REGULATIONS INVOLVED

The pertinent provisions of the statute and regulations are printed in the Appendix, *infra*, pp. 21–32.

STATEMENT

The facts of record and as contained in the opinion of the Tax Court (R. 110–124) may be summarized as follows:

This proceeding involves the disallowance by the Commissioner of a claim for refund (R. 179–188A), filed June 30, 1937, of processing taxes paid by the claimant on the processing of hogs in the sum of $330,629.07, for the period November, 1933–May, 1935. The Commissioner moved, on August 24, 1944, to dismiss the proceeding, first, on the ground that the claim for refund is legally insufficient to confer jurisdiction upon the Tax Court to review the disallowance on the

merits as the claim was not prepared in accordance with the applicable statutes, the regulations duly promulgated by the Commissioner, and the printed instructions on the official form; and, second, that a hearing on the merits would be a useless procedure because the Commissioner could not have determined legally from the facts stated in the claim for refund that the claimant had borne the burden of any part of the amount paid as processing tax, and that any hearing on the merits before the Tax Court would be limited to the grounds stated in the claim for refund and the facts stated in support of those grounds. (R. 49–53.)

The claimant set forth, in Schedule D–1 (a) of its claim, a statement by months of the processing tax which accrued during each month and a statement by months of the total number of units of the commodity processed during the month. In column (2), entitled "Gross sales value of all articles processed from the commodity", it inserted only the words "not available". Column (3), entitled "Costs of the commodity processed during month" was left blank, as were column (5), entitled "Total of columns 3 and 4" and column (6), entitled "Margin (Amount in column 2 less amount in column 5)". There was a place at the bottom of this sheet where the claimant was supposed to show the average margin for the tax period per unit of the commodity. This was also left blank.

Schedule D–1 (b), entitled "Average margin for the period before and after the tax", was left entirely blank except for the insertion of the words "not available". Schedule D–1 (c), entitled "Calculation of amount as indicated by the evidence as to margins", was left entirely blank. Just below (c), the following is printed on the form: "(Claimant must complete either A or B below and strike out the one not applicable.)" "A" is a statement that the amount shown as the tax burden borne by the claimant and not shifted, as indicated by marginal evidence, is correct, and the form instructs the claimant, if it agrees that the figure is correct, to set forth in support thereof in Schedule D–2 any additional facts and evidence it may have; "B" is a statement that the amount shown as the tax burden borne by the claimant and not shifted, as indicated by the marginal evidence, is incorrect, together with a statement of the correct amount "for the reasons and upon the evidence set out and made a part of Schedule D–2". The claimant did not complete either "A" or "B" and did not strike out either one as not applicable. Nevertheless, it did make certain statements under D–2, which will be discussed later. (R. 113–114.)

The failure of the claimant to set forth sufficient facts from which the amount of tax burden borne by it and not shifted, as indicated by mar-

ginal evidence, could be computed deprived both the claimant and the Commissioner of the benefit of any presumption arising from marginal data. Furthermore, since the claimant failed to set forth the marginal data for the tax period called for in Schedule D–1 (a), both parties were deprived of any benefit from the use, for comparative purposes, of data for the period before and after the tax, obtained by reference to representative concerns engaged in a similar business and similarly circumstanced, as provided in Section 907 (c). Thus, the claimant could obtain no benefit from any presumption in regard to margins as provided in Section 907. (R. 114–115.)

The claimant conceded in Schedule E of the claim that it had not refunded to its vendees any of the processing taxes. The only other matter in the claim was four exhibits A, B, C, and D (R. 185–188A) listed under Schedule "D–2, Other evidence. (Claimant shall list below each document, exhibit, statement of facts, and other evidence submitted with and made a part of this schedule in support of the showing as to margins, or in rebuttal thereof and tending to establish that he bore the burden of the tax. See also pars. 7 (a) and 7 (c) of instructions.)" (R. 115–116.) Exhibit A (R. 185–186) entitled "Statement of Facts" stated in substance that the claimant was engaged in the meat packing business; that certain important books and records had been de-

stroyed after the sale of the plant to Armour & Company; that the claim for refund had been prepared to the best of claimant's ability on the basis of information and records available at the time; that it was believed certain data and records would be available in the future; that the processing tax was not passed on by the company; that the processing tax, while accrued on the books, was not paid except for several comparatively small amounts; that the company did not include the amount of the tax in fixing prices; that because of competition the tax could not be added to the already high cost of pork products; that Exhibit B, attached, was a list of losses sustained by the company during the tax period; that Exhibits C and D, without segregation as to pork and other products, showed a decrease in gross profits during the tax period and, because of a marked improvement during the tax period in the sales of beef and lamb, that sales of pork products alone would undoubtedly show that the full amount of the tax was absorbed by the company (R. 116–117).

The claim for refund (R. 179–188A), made under oath, was filed on June 30, 1937. The claimant never attempted to amend that claim. However, on October 12, 1938, it forwarded to the Commissioner a document entitled "Rider Attached to PT Form 79" (R. 189–209). This docu-

ment does not purport to be, and apparently was not intended to be, an amendment to the claim for refund. It was not sworn to. The oath to the claim for refund filed June 30, 1937, could not cover a document subsequently submitted. Counsel for the claimant in its brief in the Tax Court stated: "We concede that, as stated by respondent's counsel, this 'rider' is largely argumentative, and, in effect, a lawyer's brief". The Tax Court found that the "rider" was not a part of the claim and should be ignored. (R. 120.) The claimant stated on the "rider" (R. 203): "The incidence of the tax may have been shifted on some cuts and absorbed on others but the actual facts Claimant has no way of knowing" (R. 203, 123).

The Tax Court also found that there was no waiver by the Commissioner of any defects in the claim for refund since the Commissioner at all times urged the claimant to amend its claim to include complete marginal data, or at least such marginal data as was available, and also urged the claimant to amend its claim to include a statement of any other facts upon which it relied. The claimant, however, never amended its claim and said that its failure to do so was due to the unavailability of evidence of other supporting facts. (R. 121.) The notice of disallowance (R. 33–34) clearly shows that the claim was denied because of its insufficiency and that the Commissioner did

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not consider and reject the claim on its merits (R. 121–122).

After considering the statements in the claim for refund and the exhibits attached thereto, the Tax Court held, (1) that the claim must contain a statement of the facts relied upon to show the extent to which claimant bore the burden of the tax and was entitled to a refund; (2) that in none of the statements separately, or in all of them taken together, was there a statement of facts which, if proved, would show whether the claimant bore the burden of the tax or passed it on entirely, or to some extent, to others; (3) that conclusions unsupported by facts were insufficient for such a showing; (4) that the Commissioner had not waived the defects in the claim; (5) that the claimant would not be permitted to prove at a hearing before that court any facts not set forth in its claim; (6) that where the claim is clearly inadequate in its statement of facts, the proceeding may be dismissed without hearing, since a hearing would serve no useful purpose; and (7) that no inequity is done by refusing to allow the claimant to go to trial, with the additional expense incident thereto, where a trial could not possibly result in any refund or benefit to the claimant (R. 118–119, 121, 123–124).

The Tax Court therefore entered an order dismissing the proceeding (R. 125). The Circuit Court of Appeals affirmed (R. 235).

ARGUMENT

1. There is no dissent, in the decisions of this Court or in those of the lower federal courts, from the proposition that the requirements of the statute and meticulous compliance with the Treasury Regulations promulgated pursuant to the express authority granted by Congress in Title VII of the Revenue Act of 1936 are essential in order to establish the right to a refund of processing taxes.[1] Section 903 of the statute, as amended, provides that no refund shall be made or allowed unless a claim for refund has been filed in accordance with the Regulations prescribed by the Commissioner with the approval of the Secretary, and further provides that "all

[1] *Angelus Milling Co.* v. *Commissioner*, 325 U. S. 293; *Tennessee Consolidated C. Co.* v. *Commissioner*, 117 F. 2d 452 (C. C. A. 6th); *Samara* v. *United States*, 129 F. 2d 594 (C. C. A. 2d), certiorari denied, 317 U. S. 686; *Arabi Packing Co.* v. *Commissioner*, 109 F. 2d 278 (C. C. A. 5th), certiorari denied, 310 U. S. 645; *Lee Wilson & Co.* v. *Commissioner*, 111 F. 2d 313, 318 (C. C. A. 8th); *Lee Wilson & Co.* v. *Commissioner*, 123 F. 2d 232 (C. C. A. 8th); *Caldwell Sugars* v. *United States*, 54 F. Supp. 544 (C. Cls.); *Franklin Peanut Co.* v. *Commissioner*, 144 F. 2d 979 (C. C. A. 4th); *New York Handkerchief Mfg. Co.* v. *United States*, 142 F. 2d 111 (C. C. A. 7th), certiorari denied, 323 U. S. 725; *18th Street Leader Stores* v. *United States*, 142 F. 2d 113 (C. C. A. 7th), certiorari denied, 323 U. S. 725; *Alexander Smith & Sons C. Co.* v. *Commissioner*, 117 F. 2d 974 (C. C. A. 2d); *Oswald Jaeger Baking Co.* v. *Commissioner*, 108 F. 2d 375 (C. C. A. 7th); *Cherokee Textile Mills* v. *Commissioner* (C. C. A. 6th), decided March 24, 1947 (1947 C. C. H., par. 9198). See also *United States* v. *Standard Oil Co.*, 158 F. 2d 126 (C. C. A. 6th), in which a petition for a writ of certiorari has been filed, No. 1299, this Term.

evidence relied upon in support of such claim shall be clearly set forth under oath." Appendix, *infra,* p. 22. Article 201 of Treasury Regulations 96 (Appendix, *infra,* p. 28) provides that claims for refund shall be made on prescribed forms and "shall be prepared in accordance with the instructions contained on the forms and in accordance with the provisions of these regulations." Article 202 provides that each claimant shall set forth in detail and under oath each ground upon which the refund is claimed and must substantiate by clear and convincing evidence all of the facts necessary to establish the claim. Article 601 requires that claims for refund be prepared on P. T. Form 79. Article 603 provides that the claimant "shall set forth in the claim complete data with respect to the amount of processing tax which he has paid on the processing of the commodity". Article 605, relating to the *prima facie* presumption under Section 907 of the Act, Appendix, *infra,* p. 23, provides that "There shall be submitted with, and as a part of, each claim, a statement showing the average margin for the tax period and for the period before and after the tax". Article 606 provides that the claimant may submit with the claim any other available information tending to establish that it bore the burden of the tax.

While it is not necessary for the Government to insist, as the claimant suggests it does (Br. 22–23), that, under the regulations, all "evidence"

in support of the claim be stated therein, the Government does insist that the statute and regulations require a statement of the facts relied upon—a statement of facts which, if proved, would be sufficient to show that the claimant bore the burden of the tax and is entitled to a refund. It further insists that no proof may be offered of facts which are not stated in the claim. Under the authorities, the Tax Court's holding (R. 112, 119, 121, 123–124) that, in the absence of facts showing that the claimant bore the burden of the tax, the claim was insufficient to furnish a legal basis for refund and the claimant would not be permitted to prove at a hearing before the Tax Court any other facts not set forth in the claim or not theretofore presented to the Commissioner, was plainly correct.[2] Equally correct was the

[2] *Angelus Milling Co.* v. *Commissioner*, 325 U. S. 293, 299, affirming 144 F. 2d 469 (C. C. A. 2d), and 1 T. C. 1031; *Louis F. Hall & Co.* v. *United States*, 148 F. 2d 274, 275 (C. C. A. 2d), certiorari denied, 326 U. S. 728; *Cudahy Packing Co.* v. *United States*, 152 F. 2d 831, 834 (C. C. A. 7th); *Tennessee Consolidated C. Co.* v. *Commissioner*, 117 F. 2d 452, 454 (C. C. A. 6th); *Samara* v. *United States*, 129 F. 2d 594, 597–598 (C. C. A. 2d), certiorari denied, 317 U. S. 686; *Lee Wilson & Co.* v. *Commissioner*, 111 F. 2d 313, 317–318 (C. C. A. 8th); *Lee Wilson & Co.* v. *Commissioner*, 123 F. 2d 232, 234 (C. C. A. 8th); *Caldwell Sugars* v. *United States*, 54 F. Supp. 544, 552 (C. Cls.). The courts are in agreement on this point though some have held that dismissal for lack of jurisdiction is not the proper procedure. The Tax Court's decision here was in line with the decision in the *Samara* and *Hall* cases, *supra*, as to procedure, but dismissal for lack of jurisdiction would, we think, also have been proper.

Tax Court's ruling (R. 118) that general assertions and conclusions stated in the claim may not be substituted for, or serve the function of, a statement of the facts relied on.[3]

In its opinion (R. 113–120), the Tax Court analyzed the statements contained in the claim and clearly pointed out the defects and failure to state sufficient facts to show that the claimant bore the burden of the tax. The petitioner's repeated assertion (Pet. 5, 8–10, Br. 2–3, 5, 14–20) that the Tax Court and the Circuit Court of Appeals erred in holding that the failure to present "marginal data", was fatal to the claim is not supported by the record. What the Tax Court held (R. 114–115) was that the failure to present marginal data deprived both the claimant and the Commissioner of any benefit which they might have derived from a presumption arising from marginal data. And both were likewise deprived of any benefit which might flow by use, for comparative purposes, of data for the period before and after the tax, obtained by reference to representative concerns engaged in a similar business and similarly circumstanced, as provided in Section 907 (c). *Lee Wilson & Co.* v. *Commissioner*, 123 F. 2d 232 (C. C. A. 8th). Neither did the

[3] *Landrum* v. *Commissioner*, 122 F. 2d 857, 859 (C. C. A. 8th); *18th Street Leader Stores* v. *United States*, 142 F. 2d 113, 114–116 (C. C. A. 7th); *Lee Wilson & Co.* v. *Commissioner, supra; Tennessee Consolidated C. Co.* v. *Commissioner, supra; Samara* v. *United States, supra.*

Circuit Court of Appeals base its opinion of affirmance on the sole ground of claimant's failure to present marginal data in the claim for refund but upon the same grounds as in the Tax Court's decision, namely, a failure to state facts, in support of the claim, sufficient to show the extent to which claimant bore the burden of the processing tax. Thus there is no conflict with the decisions relied upon by the claimant (Br. 17–19).

In the absence of marginal data, the claimant then had the burden of showing by other facts and data the extent to which it bore the burden of the tax on sales of its pork products. Section 907 (e), Appendix, *infra*, pp. 26–28. But it cannot be disputed that the data claimant furnished to the Commissioner related to its entire business, including the slaughter of beef, lamb and other nontaxable products (R. 188–188A). Such data was patently insufficient to show that claimant bore the burden of the tax on the processing of pork products which alone was subject to the tax.

The four Exhibits A, B, C and D (R. 185–188A), submitted by the claimant under Schedule D–2 of the claim, prove nothing as to bearing the burden of the tax. The statement in Exhibit A that competition prevented the tax from being added to the already high cost of pork products is a mere assertion or conclusion. No facts are stated to show whether or not the statement was true or upon what it was based. It is known, however, that the meat packing industry gen-

erally, upon the announcement of the imposition of the tax, immediately took steps to shift the burden to the consuming public and, at the time of the incidence of the tax, market prices of products were increased by the amount of the tax. *Cudahy Packing Co.* v. *United States,* 152 F. 2d 831, 834–836 (C. C. A. 7th).

The statement in Exhibit B that the business sustained losses during the tax period does not of itself show whether claimant bore the burden of the processing tax on pork products alone. The claimant also processed beef and lamb which items were not subject to any processing tax. But even a showing of losses sustained during the tax period upon pork processing business alone would not establish that claimant had borne the burden of the processing tax.[4]

The statements in Exhibits C and D purport to show that there was a decrease in gross profits during the tax period but that there was a marked improvement in the sales of beef and lamb. No facts are stated to support that assertion or the conclusion that a statement showing separate sales

[4] *Sellmayer Packing Co.* v. *Commissioner*, 146 F. 2d 707, 713 (C. C. A. 4th); *Greenwood Packing Plant* v. *Commissioner*, 131 F. 2d 815 (C. C. A. 4th); *Landrum* v. *Commissioner*, 122 F. 2d 857, 860 (C. C. A. 8th); *Byars* v. *Commissioner*, 138 F. 2d 513 (C. C. A. 5th); *Williams* v. *Commissioner*, 153 F. 2d 547, 548 (C. C. A. 5th), certiorari denied, October 14, 1946, rehearing denied, November 12, 1946; *Wilson Milling Co.* v. *Commissioner*, 138 F. 2d 249, 251 (C. C. A. 8th), certiorari denied, 320 U. S. 800.

and costs of pork products would show that the full amount of the tax was absorbed by the company.[5] Here again there is no segregation made between nontaxable beef and lamb and taxable hogs processed. Such a showing was essential. The so-called data contained in Exhibits C and D, which it is claimed show a smaller average margin on "gross sales" for the tax period do not represent the statutory margin provided in Section 907 of the Act. Such data prove nothing with respect to bearing the tax burden of sales of pork and the right to a refund.

The Tax Court properly held (R. 119) that none of the above statements, taken separately or together, contain a statement of facts which, if proved, would show whether or not the claimant bore the burden of the tax. Since no other facts could be proved at the hearing, further proceedings would be a waste of time and, consequently, the dismissal of the proceeding was proper.

2. The Tax Court held that the "record clearly indicates that there was no waiver" of the defects in the claim for refund (R. 121). It pointed out that (R. 121–122)—

> The Commissioner was at all times urging the petitioner to amend its claim to in-

[5] The taxpaper admitted that "The incidence of the tax may have been shifted on some cuts and absorbed on others, but the actual facts Claimant has no way of knowing". (R. 203).

> clude complete marginal data, or at least such marginal data as were available, and it was also urging the petitioner to amend its claim to include a statement of any other facts upon which it relied. * * * The fact that the Commissioner was patient with the petitioner and had various conferences in an effort to obtain additional information does not show that the Commissioner waives the defects in this claim. The notice of disallowance clearly shows that the claim was denied because of its insufficiency and that the Commissioner did not consider and reject the claim on its merits.

The affirmance of this conclusion by the court below creates no conflict of decisions. Cf. Pet. 4, 6; Br. 6–10, 17–20. The governing principles applicable to the instant case are found in *Angelus Milling Co.* v. *Commissioner,* 325 U. S. 293. There is no similarity here to the situation in *Tucker* v. *Alexander,* 275 U. S. 228, relied upon by the claimant (Br. 6–8). That case was fully explained in *United States* v. *Garbutt Oil Co.,* 302 U. S. 528, 534, and simply holds that a Government official (counsel for the Government in that case) may waive the proper form and contents of a claim for refund, prior to the expiration of the period of limitation, when the only effect of an insistence upon a proper statement would have been "the resort of filing a new claim and pursuing it through the Bureau and the courts". Here, on

the other hand, the Commissioner's alleged waiver would have been an attempted abandonment of an absolute defense to the claim.[6]

In *United States* v. *Memphis Cotton Oil Co.*, 288 U. S. 62, also relied upon by the claimant (Br. 6, 8–9), the Commissioner had admittedly investigated and audited the taxpayer's books, examined the claim for refund on the merits and notified the taxpayer of an overpayment of taxes which would be the subject of a certificate of overassessment. Furthermore, a properly amended claim for refund was filed before the rejection of the original claim. This Court expressly reserved the question of whether the Commissioner's action in investigating the claim on the merits and reporting to the taxpayer the result of his inquiry was a waiver which would call for the return of overpayments without the filing of an amended claim.

In the instant case, there was not a determination on the merits resulting in an allowance of any part of the claim. The claim was rejected and no curative amended claim was ever filed. The Commissioner endeavored to get the claimant to submit additional data in support of its claim and while the claimant continually prom-

[6] The extent to which compliance with the statute and the regulations is required as a condition precedent to suit against the Government is further illustrated by later decisions of this Court in *United States* v. *Henry Prentiss & Co.*, 288 U. S. 73; *United States* v. *Factors & Finance Co.*, 288 U. S. 89; *Bemis Bro. Bag Co.* v. *United States*, 289 U. S. 28; *United States* v. *Andrews*, 302 U. S. 517.

ised to do so, it never did. (Exs. A to N, inclusive, R. 134–176). The obvious reason for failure to furnish necessary factual data in support of its claim was simply that none could be furnished.

There is no conflict with *Bonwit Teller & Co.* v. *United States,* 283 U. S. 258. In that case, prior to the amendment of March 3, 1925, to Section 281 (e) of the Revenue Act of 1924, the Commissioner had finally, upon full information and consideration, determined that the taxpayer had overpaid its tax in a stated amount, but he was withholding a refund solely because the taxpayer had not complied with Section 281 as it stood prior to the amendment. After the amendment, the Commissioner notified the taxpayer that the overassessment could not be allowed unless the taxpayer filed a waiver as required by the amended section and enclosed the waiver forms. The taxpayer executed and returned a waiver before the due date together with a letter. This Court held that the Commissioner was warranted in accepting the waiver and the letter transmitting it together with the former proceedings, as amounting to the filing of a claim for refund within the meaning of the amended statute. There is no parallel there to the facts in the instant case.

Nor is *Bethlehem Baking Co.* v. *United States,* 129 F. 2d 490 (C. C. A. 3d), apposite. In that

case, the Commissioner made no objection to the absence of an oath to certain evidence in support of a claim for refund of taxes but examined and considered the claim on its merits. The court held that the Commissioner waived any objection concerning the form of the submission and that such evidence was admissible in the trial court in a suit against the United States.

In *Samara* v. *United States*, 129 F. 2d 594 (C. C. A. 2d), certiorari denied, 317 U. S. 686, a defect in the form of a claim for refund, resulting merely from taxpayer's failure to comply with instructions required by Treasury Regulations was held not to be jurisdictional and subject to waiver by the Commissioner. The court there construed the phrase "All evidence relied upon in support of such claim" as meaning all evidence upon which claimant relies rather than all available evidence. It should be noted, however, that, in that case, the court held a taxpayer's affidavit in support of the claim for refund alleging that the taxpayer had borne the burden of the tax to be merely an assertion and not sufficient to prove that the burden was not shifted to others where the affidavit was devoid of factual support. It was further held that in a suit to recover taxes, after denial of a claim for refund, the taxpayer can rely for recovery only upon the grounds presented to or considered by the Commissioner. The case affirms the principle that all facts relied

upon must be stated in the claim for refund and that taxpayer's evidence was limited at trial to that which was adduced by the taxpayer before the Commissioner. The court, in conclusion, held that dismissal of the complaint on defendant's motion was proper where the only evidence before the Commissioner that it bore the burden of the tax was taxpayer's affidavit to that effect. That case supports the decisions in the instant case rather than the taxpayer's contentions.

CONCLUSION

The decisions of the courts below are correct and there is no conflict. The petition for a writ of certiorari should, therefore, be denied.

Respectfully submitted.

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MAY 1947.

APPENDIX

Revenue Act of 1936, c. 690, 49 Stat. 1648:

TITLE VII—REFUNDS OF AMOUNTS COLLECTED UNDER THE AGRICULTURAL ADJUSTMENT ACT

SEC. 901. REPEALS.

Sections 21 (d), 21 (e), and 21 (g) of the Agricultural Ajustment Act, as amended, are hereby repealed. (7 U. S. C. 623.)

SEC. 902. CONDITIONS ON ALLOWANCE OF REFUNDS.

No refund shall be made or allowed, in pursuance of court decisions or otherwise, of any amount paid by or collected from any claimant as tax under the Agricultural Adjustment Act, unless the claimant establishes to the satisfaction of the Commissioner in accordance with regulations prescribed by him, with the approval of the Secretary, or to the satisfaction of the trial court, or the Board of Review in cases provided for under section 906, as the case may be—

(a) That he bore the burden of such amount and has not been relieved thereof nor reimbursed therefor nor shifted such burden, directly or indirectly, (1) through inclusion of such amount by the claimant, or any person directly or indirectly under his control, or having control over him, or subject to the same common control, in the price of any article with respect to which a tax was imposed under the provisions of such Act, or in the price of any article

processed from any commodity with respect to which a tax was imposed under such Act, or in any charge or fee for services or processing; (2) through reduction of the price paid for any such commodity; or (3) in any manner whatsoever; and that no understanding or agreement, written or oral, exists whereby he may be relieved of the burden of such amount, be imbursed therefor, or may shift the burden thereof; or

(b) That he has repaid unconditionally such amount to his vendee (1) who bore the burden thereof, (2) who has not been relieved thereof nor reimbursed therefor, nor shifted such burden, directly or indirectly, and (3) who is not entitled to receive any reimbursement therefor from any other source, or to be relieved of such burden in any manner whatsoever. (7 U. S. C. 644.)

SEC. 903 [as amended by Section 405, Revenue Act of 1939, c. 247, 53 Stat. 862].

FILING OF CLAIMS.

No refund shall be made or allowed of any amount paid by or collected from any person as tax under the Agricultural Adjustment Act unless, after the enactment of this Act, and prior to January 1, 1940, a claim for refund has been filed by such person in accordance with regulations prescribed by the Commissioner with the approval of the Secretary. All evidence relied upon in support of such claim shall be clearly set forth under oath. The Commissioner is authorized to prescribe by regulations, with the approval of the Secretary, the number of claims which may be filed by any person with respect to the total amount paid by or collected from such

person as tax under the Agricultural Adjustment Act, and such regulations may require that claims for refund of processing taxes with respect to any commodity or group of commodities shall cover the entire period during which such person paid such processing taxes. (7 U. S. C. 645.)

SEC. 907. EVIDENCE AND PRESUMPTIONS.

(a) Where the refund claimed is for an amount paid or collected as processing tax, as defined herein, it shall be prima-facie evidence that the burden of such amount was borne by the claimant to the extent (not to exceed the amount of the tax) that the average margin per unit of the commodity processed was lower during the tax period than the average margin was during the period before and after the tax. If the average margin during the tax period was not lower, it shall be prima-facie evidence that none of the burden of such amount was borne by the claimant but that it was shifted to others.

(b) The average margin for the tax period and the average margin for the period before and after the tax shall each be determined as follows:

(1) *Tax period.*—The average margin for the tax period shall be the average of the margins for all months (or portions of months) within the tax period. The margin for each such month shall be computed as follows: From the gross sales value of all articles processed by the claimant from the commodity during such month, deduct the cost of the commodity processed during the month and deduct the processing tax paid with respect thereto. The sum so ascertained shall be divided by the total number of units of the commodity processed during

such month, and the resulting figure shall be the margin for the month.

(2) *Period before and after the tax.*—The average margin for the period before and after the tax shall be the average of the margins for all months (or portions of months) within the period before and after the tax. The margin for each such month shall be computed as follows: From the gross sales value of all articles processed by the claimant from the commodity during such month, deduct the cost of the commodity processed during the month. The sum so ascertained shall be divided by the number of units of commodity processed during such month, and the resulting figure shall be the margin for the month.

(3) *Average margin.*—The average margin for each period shall be ascertained in the same manner as monthly margins under subdivisions (1) and (2), using total gross sales value, total cost of commodity processed, total processing tax paid, and total units of commodity processed, during such period.

(4) *Combination of commodities.*—Where, as, for example, in the case of certain types of tobacco, the articles produced and sold by the claimant are the product of several commodities combined by him during processing, the average margins shall be established with respect to such commodities as a group, and not individually, in accordance with rules and regulations prescribed by the Commissioner, with the approval of the Secretary of the Treasury.

(5) *Cost of commodity.*—The cost of commodity processed during each month shall be (a) the actual cost of the commodity processed if the accounting procedure of the claimant is based thereon, or

(b) the product computed by multiplying the quantity of the commodity processed by the current prices at the time of processing for commodities of like quality and grade in the markets where the claimant customarily makes his purchases.

(6) *Gross sales value of articles.*—The gross sales value of articles shall mean (a) the total of the quantity of each article derived from the commodity processed by the claimant during each month multiplied by (b) the claimant's sale prices current at the time of processing for articles of similar grade and quality.

(7) The quantity of each article derived from the commodity processed may be either (a) the actual quantity obtained, as shown by the records of the claimant, or (b) an estimated quantity computed by multiplying the quantity of commodity processed by appropriate conversion factors giving the quantity of articles customarily obtained from the processing of each unit of the commodity.

(c) The "tax period" shall mean the period with respect to which the claimant actually paid the processing tax to a collector of internal revenue and shall end on the date with respect to which the last payment was made. The "period before and after the tax" shall mean the twenty-four months (except that in the case of tobacco it shall be the twelve months) immediately preceding the effective date of the processing tax, and the six months, February to July, 1936, inclusive. If during any part of such period the claimant was not in business, or if his records for any part of such period are so inadequate as not to provide satisfactory data on prices paid for commodities purchased or prices received for

articles sold, the average prices paid or received by representative concerns engaged in a similar business and similiarly circumstanced may with the approval of the Commissioner, where necessary for a fair comparison, be substituted in making the necessary computations. If the claimant was not in business during the entire period before and after the tax, the average margin, during such period, of representative concerns engaged in a similar business and similarly circumstanced, as determined by the Commissioner, shall be used as his average margin for such period.

(d) If the claimant made any purchase or sale otherwise than through an arm's-length transaction, and at a price other than the fair market price, the Commissioner may determine the purchase or sale price to be that for which such purchases or sales were at that time made in the ordinary course of trade.

(e) Either the claimant or the Commissioner may rebut the presumption established by subsection (a) of this section by proof of the actual extent to which the claimant shifted to others the burden of the processing tax. Such proof may include, but shall not be limited to—

(1) Proof that the difference or lack of difference between the average margin for the tax period and the average margin for the period before and after the tax was due to changes in factors other than the tax. Such factors shall include any clearly shown change (A) in the type or grade of article or commodity, or (B) in costs of production. If the claimant asserts that the burden of the tax was borne by him and the burden of any other increased costs was shifted to others, the Commissioner

shall determine, from the effective dates of the imposition or termination of the tax and the effective date of other changes in costs as compared with the date of the changes in margin (when margins are computed for weeks, months, or other intervals between July 1, 1931, and August, 1936, in the manner specified in subsection (b)), and from the general experience of the industry, whether the tax or the increase in other costs was shifted to others. If the Commissioner determines that the difference in average margin was due in part to the tax and in part to the increase in other costs, he shall apportion the change in margin between them:

(2) Proof that the claimant modified existing contracts of sale, or adopted a new form of contract of sale, to reflect the initiation, termination, or change in amount of the processing tax, or at any such time changed the sale price of the article (including the effect of a change in size, package, discount terms, or any other merchandising practice) by substantially the amount of the tax or change therein, or at any time billed the tax as a separate item to any vendee, or indicated by any writing that the sale price included the amount of the tax, or contracted to refund any part of the sale price in the event of recovery of the tax or decision of its invalidity; but the claimant may establish that such acts were caused by factors other than the processing tax, or that they do not represent his practice at other times. If the claimant processed any product in addition to the commodity with respect to the processing of which there was paid or collected an amount as tax for which he claims a refund, and if the Commissioner has rea-

son to believe that the burden of such amount was shifted in whole or in part by means of the transactions relating to such product, the average margin with respect to such product, and articles processed therefrom, shall also be considered, and shall be determined for the tax period applicable to the commodity and for the period before and after the tax in the manner prescribed in subsection (b) of this section. To the extent the Commissioner determines that the average margin with respect to such product was higher during the tax period than it was during the period before and after the tax, it shall be prima-facie evidence that such amount was not borne by the claimant but that it was shifted to others. (7 U. S. C. 649.)

Treasury Regulations 96, promulgated under the Revenue Act of 1936:

ARTICLE 201. *Claims—Form and where to file.*—Claims for the refund of tax shall be made on the prescribed forms. Such claims shall be prepared in accordance with the instructions contained on the forms and in accordance with the provisions of these regulations. Each claim (except claims for refund of compensating tax—see article 401) shall be filed with the collector of internal revenue for the district wherein the claimant has his principal place of business. If the claimant has no principal place of business in the United States, the claim shall be filed with the collector of internal revenue located at Baltimore, Md. Copies of the prescribed forms may be obtained from any collector of internal revenue.

ART. 202. *Facts and evidence in support of claim.*—Each claim shall set forth in de-

tail and under oath each ground upon which the refund is claimed. It is incumbent upon the claimant to prepare a true and complete claim and to substantiate by clear and convincing evidence all of the facts necessary to establish his claim to the satisfaction of the Commissioner; failure to do so will result in the disallowance of the claim.

The provisions of these regulations require that certain specific facts shall be stated in support of any claim for refund. The claimant is privileged to prove those facts in any manner available to him and to submit such evidence to that end as he may desire.

ART. 204. *Conditions as to tax burden with respect to amount of refund allowable*—A refund may be allowed to the person who paid the tax, only of that amount paid as tax as to which the claimant establishes to the satisfaction of the Commissioner (1) that he bore the burden of such amount and has not been, or may not be, relieved thereof nor reimbursed therefor, and has not shifted such burden, directly or indirectly, through or by any of the means set forth in subsection (a) of section 902 of the Act; or (2) that he has repaid such amount unconditionally to his vendee who bore the burden thereof, as provided in subsection (b) of section 902 of the Act.

ART. 601. *Claim form prescribed.*—Claims for refunds of amounts paid as processing tax (as defined in section 913 (b) of the Act) shall be filed on P. T. Form 79. (See Chapter II of these regulations for general provisions relating to all claims.)

ART. 603. *Payment of tax.*—The claimant shall set forth in the claim complete data with respect to the amount of processing tax which he has paid on the processing of the commodity. Each claim shall show as to each month's processing of the commodity: (1) the total tax liability returned; (2) the total amount of tax paid on the first domestic processing of the commodity; (3) the date and amount of each payment and the month for which paid; (4) that part of the total amount paid which represented the processing of the commodity for a customer for a charge or fee ("custom processing tax," see Chapter V of these regulations); (5) that part of the total amount paid which represented processing tax, as defined in section 913 (b) of the Act; and (6) the collector to whom each payment was made. In the case of tobacco the above data respecting tax payment shall be shown separately with respect to each market classification.

ART. 605. *Evidence as to margins.*—Section 907 of the Act provides that in claims for refund of amounts paid as processing tax it shall be prima facie evidence that the burden of such amount was borne by the claimant to the extent (not to exceed the amount of the tax) that the average margin per unit of the commodity processed was lower during the tax period than the average margin per unit of such commodity was during the period before and after the tax. If the average margin during the tax period was not lower, it shall be prima facie evidence that none of the burden of such amount was borne by the claimant but that it was shifted to others.

There shall be submitted with, and as a part of, each claim, a statement showing the

average margin for the tax period and for the period before and after the tax. (For definition of "tax period" and "period before and after the tax," see section 907 (c) of the Act.)

The average margin for the tax period shall be computed as follows: Determine for each month during the period (1) the gross sales value of articles derived from the commodity processed during such month; (2) the cost of the commodity processed during such month; (3) the amount of processing tax paid with respect to the quantity of the commodity processed during the month; and (4) the number of units of the commodity processed during the month. The sum of the monthly gross sales values for all months during the period minus the sum of the monthly costs of the commodity processed for all months during the period, minus the sum of the processing taxes paid for all months during the period, and divided by the sum of the number of units of the commodity processed during all the months comprising the period is the average margin for such period. (For definition of "cost of commodity" and "gross sales value," see section 907 (b), paragraphs (5) and (6), respectively, of the Act.)

The average margin for the period before and after the tax shall be computed in the same manner as the average margin for the tax period, except that the processing tax does not enter into the computation.

In determining the average margin for the tax period, the "number of units of the commodity processed" shall be the number of units of the commodity with respect to which the claimant actually paid the processing tax; the "cost of the commodity

processed" shall be the cost of the number of units of the commodity with respect to which the claimant actually paid the processing tax; the "gross sales value of articles" shall be the gross sales value of articles processed from the number of units of the commodity with respect to which the claimant actually paid the processing tax.

In support of such statement there shall be submitted, verified by appropriate affidavit, a detailed showing of the manner in which the margins for each month and the average margins for each period were ascertained, the data and records on which they were based, the location of such data and records, and all other related matters, including the accounting procedure of the claimant, which entered into the computations of such margins. All elements, factors, units, or measures entering into the computation of such margins, and any departure from uniformity in the use thereof in making such computation for any part of either period, must be fully explained and justified.

ART. 606. *Other evidence.*—In addition to the showing as to margins, the claimant is privileged to submit with his claim any other evidence available to him tending to establish that he bore the burden of the tax. Such evidence may be submitted to support the prima facie presumption, if such presumption is in favor of the claimant, or to rebut such presumption if it is against him. (See section 902 and subsection (e) of section 907 of the Act.)

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